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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SHAKA SENEGAL MUHAMMAD, Defendant and Appellant.	B297043 (Los Angeles County Super. Ct. No. YA003421)

APPEAL from an order of the Superior Court of Los Angeles County, Laura C. Ellison, Judge. Affirmed.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Charles S. Lee and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Shaka Muhammad[1] guilty of second degree murder with a deadly weapon. Years later, he petitioned for resentencing under Penal Code[2] section 1170.95. The trial court summarily denied the petition. On appeal, he contends that the trial court failed to comply with the procedure in section 1170.95. We disagree and affirm the order.

BACKGROUND[3]

An information charged Muhammad and codefendant Abdul Malik Mohemmed (collectively defendants) with murder (§ 187, subd. (a)); count 1) and shooting at an occupied vehicle (§ 246; count 2). (*People v. Mohemmed*, *supra*, B064539 at p. 2.) The information also alleged personal gun use enhancements under sections 1203.06, subdivision (a)(1) and 12022.5 as to count 1 and under 12022.5 as to count 2. (*Mohemmed*, at pp. 2–3.) At Muhammad's jury trial, evidence was introduced that victim Kevin Davis and a friend left a club at which defendants were working as security guards. (*Id.* at pp. 4–5.) Defendants overheard Davis make derogatory comments. Taking offense, they followed Davis to his car, and Mohemmed fired a gun through the driver's window, killing him. Muhammad also shot Davis during the attack but only grazed his arm. A jury found

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[1] His name is spelled multiple ways in the record: Shaka Muhammad, Shaka Mohammad, Mitchell Senegal, and Shaka Mohemmed. For sake of clarity we refer to appellant as Muhammad.

[2] All further statutory references are to the Penal Code.

[3] The background regarding the underlying crimes is from the opinion affirming the judgment of conviction. (*People v. Mohemmed* (Nov. 10, 1993, B064539) [nonpub. opn.].)

defendants guilty of second degree murder and of shooting at an occupied vehicle, and the jury found true the gun-use allegations. (*Id.* at p. 3.) In 1991, the trial court sentenced Muhammad to an indeterminate term of 15 years to life plus a determinate term of five years for the gun enhancements. (*Id.* at p. 4.)

Thereafter, Senate Bill No. 1437 (2017–2018 Reg. Sess.) took effect January 1, 2019. That law amended the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder. Based on the new law, a person convicted of murder under a felony murder or natural and probable consequences theory may petition the sentencing court for vacation of the conviction and resentencing, if certain conditions are met. (§ 1170.95.)

On March 20, 2019, Muhammad filed a handwritten document that the trial court treated as a petition under Senate Bill No. 1437. Muhammad did not request counsel. However, he said—albeit not in a declaration—that he had been found guilty of second degree murder under the felony-murder rule and could not be convicted of murder if he were tried under the current law. Muhammad also submitted exhibits, including what appear to be summaries of reporter's transcripts from his trial, police reports, minute orders, and news articles.

On April 9, 2019, the trial court summarily denied the petition, stating in its order that Muhammad was convicted of second degree murder with personal use of a firearm under section 12022.5, subdivision (a). The trial court said, "Additionally it is clear from the transcript of the sentencing hearing that while the bullet that actually killed the victim may not have been fired by Petitioner, Petitioner shot at the victim as did his co-defendant (who was also convicted of murder and the

personal use of a firearm)." Citing the opinion affirming the judgment of conviction, the trial court added that Muhammad fired the first gunshot at Davis through the windshield of Davis's car. Thus, "it is abundantly clear from the record" that Muhammad was convicted and sentenced as a direct perpetrator. The trial court therefore concluded that he was ineligible for relief as a matter of law.

DISCUSSION

Muhammad contends that the trial court erred in summarily denying his petition.[4] As we now explain, we disagree.

Under Senate Bill No. 1437, malice may no longer be imputed to a person based solely on the person's participation in the crime; now, the person must have acted with malice aforethought to be convicted of murder. (§ 188; *People v. Munoz* (2019) 39 Cal.App.5th 738, 749, review granted Nov. 26, 2019, S258234.) To that end, the natural and probable consequences doctrine no longer applies to murder. And a participant in enumerated crimes is liable under the felony-murder doctrine only if the participant was the actual killer; or with the intent to kill, aided and abetted the actual killer in commission of first degree murder; or was a major participant in the underlying

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[4] The Supreme Court is reviewing whether superior courts may consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under section 1170.95 and when the right to appointed counsel arises under subdivision (c) of that section. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted Mar. 18, 2020, S260598.)

felony and acted with reckless indifference to human life. (§ 189, subd. (e); see *Munoz*, at pp. 749–750.)

Senate Bill No. 1437 also added section 1170.95. "Pursuant to subdivision (a) [of that section] only individuals who meet three conditions are eligible for relief: (1) the person must have been charged with murder 'under a theory of felony murder or murder under the natural and probable consequences doctrine,' (2) convicted of first or second degree murder, and (3) can no longer be convicted of first or second degree murder 'because of changes to Section 188 or 189 made effective January 1, 2019.' " (*People v. Drayton* (2020) 47 Cal.App.5th 965, 973.)

Section 1170.95 provides for multiple reviews of a petition by the trial court. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 897, review granted Aug. 12, 2020, S263219; *People v. Drayton*, *supra*, 47 Cal.App.5th at p. 974; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58, review granted Mar. 18, 2020, S260410; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328 (*Verdugo*), review granted Mar. 18, 2020, S260493; but see *People v. Cooper* (2020) 54 Cal.App.5th 106, review granted Nov. 10, 2020, S264684.) Subdivision (b) of section 1170.95 describes an initial review to determine the facial sufficiency of the petition. (*Verdugo*, at p. 328.) To be facially sufficient, the petition must contain the petitioner's declaration that the petitioner is eligible for relief according to the criteria in subdivision (a), the case number and year of conviction, and whether the petitioner is requesting appointment of counsel. (§ 1170.95, subd. (b)(1).) If the petition is missing any of this information "and cannot be readily ascertained by the court, the court may deny the petition without prejudice." (§ 1170.95, subd. (b)(2).) This initial review

amounts essentially to a ministerial review to ensure that the right boxes are checked.[5]

Subdivision (c) of section 1170.95 then describes the next two levels of review. It provides, "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

The first sentence in subdivision (c) refers to a prebriefing, initial prima facie review to preliminarily determine a petitioner's statutory eligibility for relief as a matter of law. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) In this step of review, the trial court determines, based upon its review of readily ascertainable information in the record of conviction and the court file, whether the petitioner is statutorily eligible for relief. (*Id.* at pp. 329–330.) The court may review the complaint, the information or indictment, the verdict form or the documentation for a negotiated plea, and the abstract of judgment. (*Ibid.*) A

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[5] Arguably, the handwritten petition was facially insufficient and, as Muhammad acknowledges, the trial court could have denied it without prejudice. However, the trial court did not deny it on that ground and we therefore do not address the petition's facial sufficiency under section 1170.95, subdivision (b).

Court of Appeal opinion is part of the appellant's record of conviction (*id.* at p. 333), as are jury instructions (*People v. Soto* (2020) 51 Cal.App.5th 1043, 1055, review granted Sept. 23, 2020, S263939). If these documents reveal ineligibility for relief, the trial court can dismiss the petition. (*Verdugo*, at p. 330.)

If the record of conviction does not establish as a matter of law the petitioner's ineligibility for resentencing, evaluation of the petition proceeds to the second prima facie review, in which "the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330.) The trial court must accept as true the petitioner's factual allegations and make a preliminary assessment regarding whether the petitioner would be entitled to relief if the factual allegations were proved. (*Id.* at p. 328.)

Section 1170.95 thus permits a trial court to make an initial determination whether the petitioner may be entitled to relief, without first appointing counsel. The structure and grammar of subdivision (c) of that section "indicate the Legislature intended to create a chronological sequence: first, a prima facie showing; *thereafter*, appointment of counsel for petitioner; then, briefing by the parties." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 332, italics added; accord, *People v. Lewis*, *supra*, 43 Cal.App.5th at p. 1140.) As *Verdugo* at pages 328 to 329 noted, to hold otherwise that counsel must be appointed once a petitioner files a facially sufficient petition renders subdivision (c) redundant to subdivision (b)(2).

Where a cursory review of the record of conviction shows that the petitioner is not entitled to relief under Senate Bill No. 1437, it " 'would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous.' " (*People v. Lewis*, *supra*, 43 Cal.App.5th at p. 1138.)

That is the case here. In his direct appeal from the judgment of conviction, Muhammad argued that the trial court erroneously instructed the jury with CALJIC No. 8.10 on felony murder because a violation of section 246 merges into the resulting homicide. (*People v. Mohemmed*, *supra*, B064539 at p. 19.)[6] The Court of Appeal agreed it was error to give the instruction but found the error to be harmless. That is, the jury was also instructed with CALJIC No. 8.30 that second degree murder requires a finding of malice aforethought and with CALJIC No. 8.31 that second degree murder requires a finding of

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[6] The jury was instructed, " 'The defendant is accused in Count I of the information of having committed the crime of murder, a violation of . . . section 187. [¶] Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of shooting at an occupied vehicle, a felony inherently dangerous to human life, is guilty of the crime of murder in violation of section 187. . . . [¶] In order to prove such crime each of the following elements must [be] proved: [¶] 1. That a human being was killed[;] 2. [¶] That the killing was unlawful[;] and, [¶] 3. The killing was done with malice aforethought or occurred during the commission or attempted commission of shooting at an occupied vehicle, a felony inherently dangerous to human life.' " (*People v. Mohemmed*, *supra*, B064539 at p. 17.)

implied malice. (*Mohemmed*, at p. 19.) By "convicting defendants for second degree murder, the jury's verdict necessarily made a finding of malice based on the correct instructions and rejected a felony murder theory partially set forth in the incorrect instruction." (*Id.* at pp. 19–20.) In addition, the jury could not have found Muhammad guilty of second degree felony murder because the erroneous instruction did not refer to second degree murder whereas the correct instructions did. (*Id.* at p. 20.)[7]

Mohemmed's conclusion that Muhammad was found guilty of second degree murder based on a finding of malice is law of the case. The law of the case doctrine precludes multiple appellate reviews of the same issue in a single case. (*People v. Barragan* (2004) 32 Cal.4th 236, 246–247.) Because the finding of malice aforethought precludes section 1170.95 relief (§ 188, subd. (a)(3)), the trial court properly denied the petition without further briefing or hearing.

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[7] Muhammad cites *People v. Mil* (2012) 53 Cal.4th 400 to ostensibly show why we cannot rely on *Mohemmed*. The trial court in *Mil* had failed to instruct on elements of an offense. *Mil* at page 417 held that such error is amenable to harmless error review. The reviewing court does not view the evidence in the light most favorable to the prosecution and presume all facts in support of the judgment that a jury might reasonably infer; instead, the task requires analyzing whether any rational fact finder could have come to the opposite conclusion. (*Mil*, at p. 418.) *Mil* is distinguishable because the trial court in this case did not omit elements of an offense. And *Mohemmed*'s harmless error analysis was not based on the evidence but on the instructions and the verdicts.

DISPOSITION

The order is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

I concur:

EGERTON, J.

LAVIN, J., Concurring and Dissenting:

A petition under Penal Code[1] section 1170.95 must allege the following: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).) The petition must also include the petitioner's declaration showing eligibility under all three enumerated conditions, as well as the superior court case number, year of conviction, and any request for appointment of counsel. (§ 1170.95, subd. (b)(1); *People v. Ramirez* (2019) 41 Cal.App.5th 923, 929.)

Here, petitioner Shaka Muhammad acknowledges that his petition did not include a declaration by him that he was eligible for relief under section 1170.95. Because his petition was missing required information, the trial court should have denied the petition without prejudice to the filing of another petition. (See § 1170.95, subd. (b)(2) ["If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information."].)

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[1] Undesignated statutory references are to the Penal Code.

I would vacate the trial court's order and instruct it to enter a new order denying the petition without prejudice. I would not reach any other issues.

LAVIN, Acting P.J.